Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	MM Docket No. 92-260
Cable Home Wiring	

JOINT REPLY COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
NATIONAL REALTY COMMITTEE
NATIONAL MULTI HOUSING COUNCIL
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
AND INSTITUTE OF REAL ESTATE MANAGEMENT

Introduction

The joint commenters, representing the owners and managers of multi-unit properties, urge the Commission not to further amend its rules to require owners of multiple dwelling units ("MDU's") to acquire cable home wiring under any circumstances, as has been suggested by various commenters. The Commission should also recognize that any demarcation point must be set with protection of the owner's property interests in mind. Any issues regarding ownership or access are best addressed by private contract, not by additional Commission regulations. The marketplace continues to be the most effective and efficient means of governing the interactions of cable operators, building owners and subscribers with respect to cable home wiring.

I. UNDER NO CIRCUMSTANCES SHOULD A PROPERTY OWNER BE FORCED TO PURCHASE OR ASSUME OWNERSHIP OF WIRE WITHOUT ITS CONSENT.

NYNEX and a number of the wireless competitors advocate an untenable position that would force building owners to purchase and own cable wire under varying circumstances on the grounds that it will facilitate NYNEX and wireless competitor's access and ability to compete against incumbent cable operators. If an owner wants to acquire wire, however, it can do so under current law through negotiation with the cable operator, whomever that might be. Often, however, the owner does not desire to get into the business of owning wire. Under no circumstances should a building owner be forced to acquire cable wire against its will.

A. The Commission Does Not Have the Authority to Regulate Building Owners and Managers.

As we discussed in our comments in this docket and in Docket 95-184, the Commission's authority is limited to common carriers, cable operators, and telecommunications providers. The Commission is not authorized to regulate the real estate industry. The Commission's power over cable wiring derives from its authority to prescribe rules for abandonment of "cable installed by the cable operator within the premises" of a subscriber. See Section 624(i) of the Cable Act, as added by Section 16(d) of the 1992 Act. Building owners and operators, as such, are not cable operators and they operate in the highly

competitive real estate market.[1] Furthermore, even if it had jurisdiction over building owners and managers, the Commission lacks jurisdiction to force ownership of cable wiring upon them.

Likewise, the Commission should not impose a ban on loop-through wiring but should allow the market to continue to reduce the number of buildings that require loop-through wiring.[2] As many respondents both in the building and the cable industries agreed[3], while the market has effectively reduced use of loop-through wiring, loop-through wiring remains the most effective means of wiring certain buildings. To ban loop-through wiring altogether could effectively restrict subscriber access to cable services in those certain instances where loop-through wiring is the most effective means of wiring the building.

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[1] The joint commenters' comments and reply comments filed in Docket 95-184 make the point on behalf of the real estate industry that Commission regulation of the highly competitive and diverse real estate market is unnecessary and impracticable.

[2] We dispute Bell Atlantic's claim that the FCC has jurisdiction over this issue under Title I of the Communications Act of 1934, 47 U.S.C. §154(i). See Comments of Bell Atlantic in Docket 92-260 at page 2. Title I does not give the Commission carte blanche to enact any rule that it chooses. The explicit provision in Section 16(d) of the 1992 Act precludes any reliance on authority inferred from Sections 1 and 4(i) of the 1934 Act. See Section 16(d) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (authority limited to wiring in subscriber's premises only). See also Bell Atlantic, 24 F.3d 1441 (D.C. Cir. 1994) and National Ass'n of Reg. Utility Com'rs v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[3] See BOMA et. al., Time-Warner, Cox, NCTA comments on 92-260.

B. Property Owners Should Not Be Made a Vehicle For Facilitating the Business of One Service Provider Over Another.

It is interesting to note that, while commenters such as NYNEX and the Wireless Cable Association argue that building owners should be required to own cable wire because such a policy would increase access and competitiveness, the cable industry, represented by Marcus Cable and NCTA, argue that building owners should not be offered the opportunity to purchase wire because building owners ostensibly create barriers to access. Each of these competitors clearly desires the Commission to enact precise regulations that ensure their business success. With each group claiming that building owners favor the other, there is no policy that the Commission can enact with respect to home wiring that will reconcile the conflicting points of view, nor should it. Cable operators, LECs and telecommunications companies in general are fully capable of negotiating their own business deals successfully. There is no regulation that the Commission can draft that would guarantee the success of all of these providers.

In addition, rather than affirmatively encouraging or increasing competition, as NCTA argues, the ultimate purpose of Section 16(d) was to reduce the property damage and disruption caused by removing wires and rewiring. "Some cable operators take the position that the wiring inside the home belongs to the operator. Thus, when the subscriber terminates the service, these cable operators remove the wiring, often causing damage in the process. ... if the subscriber, decides to terminate cable

service and later reinstate it or seek service from a different cable company, the subscriber should not have to bear the cost and inconvenience of having new wiring installed." Sen. Comm. on Commerce, Science and Transp., Cable Television Consumer Protection and Compliance Act of 1992, 102d Cong., 2d Sess, 23 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1156. Thus, any attempt by the Commission to move the demarcation point to achieve access for one competitor or another clearly violates the purpose explicitly set forth in the legislative history. Building operators will continue to satisfy the needs and demands of their tenants in a competitive market. Any attempt by the Commission to intrude on the owner-tenant relationship will ultimately serve only to limit subscribers' choices by favoring one industry over the other, while unfairly burdening building owners and managers. The Commission should not interfere with the operation of the marketplace.

II. PROPERTY OWNERS MUST RETAIN THE RIGHT TO CONTROL ACCESS TO THEIR PROPERTY AND TO AGREE ON CONTRACT TERMS ASSIGNING OWNERSHIP OF CABLE WIRING.

The discussion regarding the demarcation point has become muddied by the efforts of commenters to link the issues raised in the docket at hand and those in Docket 95-184 regarding telecommunications inside wiring. Given that commenters have presented many contradictory proposals regarding placement of the demarcation point, we feel it necessary to make one point very clear: Wherever the demarcation point is placed, the building owner must retain control over its property. This means that the

building owner must also retain the right to agree with its service providers and tenants, by contract, on who owns any wiring in the building. Section 16(d) does not give the Commission any authority over cable home wiring owned by a building operator, and the Commission should not attempt to alter the property rights of building owners in such wiring.

The current system, which respects state law and contractual negotiations between property owners and service providers, is more than sufficient to handle the ownership and access issues raised in conjunction with a discussion of the optimal demarcation point. In light of the variety of ways in which state laws treat ownership of wiring, the differences in building structures and capacities and the limited regulatory authority of the Commission under Section 16(d), Commission regulation would intrude on an already complex system in a manner not authorized by Congress. Even more importantly, given the equal negotiating power of the building owner and cable provider, these parties are ideally positioned to negotiate an agreement that will protect the building owner's property interests and the cable operator's interest in access and wiring. Given the success to date of such negotiations, it is clear that no additional regulation is necessary. The foregoing points are developed more fully in the joint reply comments being filed concurrently by the undersigned in Docket No. 95-184.

III. BUILDING OWNERS ARE ENTITLED TO RECEIVE ACCESS FEES IN RETURN FOR PROVIDING CABLE OPERATORS WITH A MARKET FOR THEIR SERVICES.

Several commenters, including Marcus Cable and NCTA, characterize access fees as "kickbacks" and claim that landlords only accept fees out of the desire for "self-enrichment." Such claims are both baseless and irresponsible. Like cable operators, building owners are in the business of serving their customers.[4] If a landlord refuses to address the telecommunications service demands of its residents, the residents will move to another building that does provide those services. Thus, any attempt by a building owner to unreasonably limit resident access to video programming services is a poor business decision and will be punished by the market. Indeed, building operators negotiate very hard, in efforts to get the best service for their residents at the lowest price.

As with any service provided in a building, there is a cost to the landlord in the form of increased safety, security and general property damage risks. Therefore, it is not an unreasonable business decision on the part of the building owner to require that the cable operator compensate it for a portion of the added risk that the building owner assumes by providing

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[4] The landlord often is in a better position than individual subscribers to negotiate deals which will provide the resident subscriber with a greater level of service at lower rates.

access to a variety of service providers.[5] Given the benefits to both the building owner and the cable operator of providing cable service, it makes good business sense for the two entities to arrange for an allocation of the risk.

In addition, cable operators and other service providers benefit from the existence of the market created by the building operator. Failing to charge an access fee would allow the cable operator to reap the benefit of the pool of potential subscribers brought together by the building owner's capital investment, marketing efforts and management skills at the sole expense of the building owner.

To label any such straightforward costs of doing business as "kickbacks" is merely a pejorative characterization and an indefensible accusation.[6] It is only good business to require the cable operator to assume some of the risk and expense that is created by the operator's access to the building, particularly

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[5] Building owners typically negotiate a standard leasing type of fee for occupying space in the building and having access for repairs and new installations.

[6] We note that the case law cited by Marcus Cable et. al. and NCTA to defend the notion of "kickback" schemes, does not, with one narrow lower court exception, question contracts between cable operators and building owners as illegal compensation. These cases actually address whether a cable operator has a right of mandatory access to private property. For example, one case cited by Marcus Cable, Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Co., No. 93-0073-C (W.D.Va., December 3, 1993), involves the interpretation of a Virginia statute banning access fees -- but that statute does not use the term "kickback" or provide for criminal penalties. VA. CODE ANN. §55-248.13:2 (Michie 1995). Most courts have rejected the notion of mandatory access to private property by cable operators.

since the substantial benefits to the operator of additional subscriber payments for cable service clearly outweigh any relatively small compensation negotiated by the landlord.

The fact is that the cable industry knows full well that access fees are reasonable but would rather have them eliminated to increase their profit margins. Cable operators have used their lobbying ability in states such as Virginia -- where the payment of even one penny as compensation is prohibited -- to have the payments banned and are now trying to do the same thing at the Commission. The Commission should not be misled by the self-interested use of inaccurate and loaded terminology.

Conclusion

The Commission should reject those pleas to amend its cable home wiring rules to require property owners to purchase cable wire under any circumstances. Further, the Commission should not attempt to set the demarcation point in a way that infringes on building owners' constitutionally-protected property interests, and under no circumstances should the right of building management to make all necessary and proper decisions regarding inside wiring be impeded. Private contracts already effectively address such issues.

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